No. 08A425

In the Supreme Court of the United States

MANNY TEMITOPE OYENUGA,
Petitioner,
v.
MICHAEL B. MUSKASEY,
UNITED STATES ATTORNEY GENERAL, and
MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

ArthurAllanSmith
Counsel of Record
28 Grand Street
Hartford, CT 06106
(860) 724-3333

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether an Immigration Judge's refusal to consider and hear evidence of witness tampering and his statement that he was indifferent as to its occurrence was not routine discretion and may not be dismissed for want of a colorable federal-question subject-matter jurisdiction pursuant to Section 106(a)(1)(A)(iii) of the REAL ID Act of 2005, Pub.L. No.109-13, Div. B, 119 Stat.231, 310-11(codified at 8 U.S.C. Sec. 1252(a)(2)(D)).

2. Whether the Second Circuit's interpretation, that is in variance with that of most circuits, that Congress intended to remove witnesses entirely from the scope of 18 U.S.C. 1503, because 18 U.S.C. 1512 preempts all prosecutions for obstructing justice by tampering with witnesses, has created a serious gap in statutory coverage in that circuit in cases where witness tampering includes obstruction of the due process of justice but not corrupt persuasion.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or nonwholly owned subsidiaries.

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Supreme Court Extension App infra 1a-2a.The Rehearing of the ourt of appeals (App., infra,3a) is unreported. Cour of Appeal decision is unreported (App., infra4a)The opinion of the Board of Immigration Appeals (App., infra, 5a-7a), is unreported. The original opinion of the Immigration Court Judge (App., infra, 8a-16a) is unreported.

JURISDICTION

The court of appeal's judgment was entered on June 3, 2008. A timely petition for rehearing was denied on August 18, 2008 (App., infra, 1a-2a). A Motion for Extension of Time was granted by this Court for a January 15, 2008 filing (App., infra, 3a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United State's Constitution guarantees that an alien is entitled to due process, a full and fair hearing of his claims, in a deportation proceedings; see relevant constitutional case law at *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) and *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005).

The application for cancellation of removal was made under section 240A(b)(1) of the Immigration and Nationality Act ("INA"), 8 U.S.C. Sec. 1229b(b)(1)..

The Government contends that judicial review of an application for cancellation of removal is precluded because it reflects a discretionary decision that is unreviewable under INA Sec. 242(a)(2)(B)(i), 8 U.S.C. Sec. 1252(a)(2)(B)(i), which provides that '[n]otwithstanding any other provision of law...no court shall have jurisdiction to review...any judgment regarding the granting of relief under [8 U.S.C.] section...1229b."

The Petitioner contends that under Section 106(a)(1)(A)(iii) of the REAL ID Act of 2005, Pub.L.No.109-13, Div. B, 119 Stat. 231, 310-11(codified at 8 U.S.C. Sec. 1252(a)(2)(D), the limitations on judicial review, as set forth in

The Government's argument above, are not to be "construed as precluding review of constitutional claims or questions of law raised upon a petition for review."

The Petitioner further contends that criminal acts thwarting due process are sui generis reviewable, but the Second Circuit's statutory interpretation of the witness tampering statute at 18 U.S.C. 1512 and the obstruction of justice statute at 18 U.S.C. 1503 has created an unintended statutory gap whereby witness tampering that does not include harassment or intimidation is omitted from review.

STATEMENT

This case raises important, recurring questions relating to how discretionary immigration claims upon petition for review, that evoke right of judicial review as a constitutional claim or question of law,

are differentiated. The Second Circuit held in *Barco-Sandoval v. Gonzales*, 516 F.3d 35 (2d Cir. 2008) that the high court's ruling on federal-question jurisdiction was illuminating for discretionary immigration claims.

Citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 n.10 (2006), the Second Circuit noted therein that, "[A] claim invoking federal-question jurisdiction under 28 U.S.C. Sec. 1331, *Bell* held, may be dismissed for want of subject-matter jurisdiction if it is not colorable, i.e., if it is "immaterial and made solely for the purpose of obtaining jurisdiction" or is "wholly insubstantial and frivolous," 327 U.S., at 682-683.

However, since the immigration court proceeding is an administrative process that does not allow for discovery or interrogatories to supplement the record, it is distinguishable from the applicable federal rules of procedure available in *Arbaugh*. When the immigration judge will not consider a due process issue in the open record below, a void is created when reconstructing the petitioner's intent, an intent determination required by *Arbaugh* reasoning at the appellate level of review. The Second Circuit's case law on the judicial review of such constitutional and question of law claims, as reflected in the recent *Barco-Sandoval* decision, is ambiguous. By *Barco-Sandoval* reasoning, Petitioner allegations of witness tampering invoking a federal-question jurisdiction may fail to meet evidentiary muster based upon unethical conduct, but may only succeed based upon the clearly proscribed criminality of the action.[1]

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[1] In *Erickson v. Newmar*, 87 F3d 298 (CA. 9(Nev.) 1996) witness tampering was found based upon leading legal ethics treaties

However, the Second Circuit is at variance with all circuits that have ruled on witness tampering, after reviewing the statutory interpretation of both the witness tampering statute, 18 U.S.C. 1512, which prohibits misleading conduct towards a witness and the use of physical force against a witness in order to prevent him from testifying, and the obstruction of justice statue, 18 U.S.C. 1503, which prohibits endeavors to influence jurors or court officers as well as other efforts to obstruct the due administration of justice. [2] The circuits having ruled on the issue all hold that the "due administration of justice" is applicable to witnesses. In contrast, the Second Circuit held in *United States v. Hernandez*, 730 F.2d 895 (1984), that Congress intended crimes against witnesses to be dealt with only by Section 1512, "[Congress] intended to remove witnesses entirely from the scope of Section 1503" (730 F.2d at 898). The Second Circuit's holding for this Petitioner, that when Department of Homeland Security (hereafter "DHS") counsel had alleged ex parte contact with Petitioner's identified expert witness and said contact raised no constitutional claims or questions of law and when the immigration judge's indifference to the alleged contact, and its possible impact on that witness's willingness to testify, was affirmed at the appellate level, witness tampering as alleged by the Petitioner fell outside of the reach

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discussing the ethical implications of communications with an adversary's expert witness, Fed.R.Civ.P.26(b)(4), and by appellate review of the district court's record, independent subpoenaed testimony and evidentiary records are unavailable for appellate review in discretionary immigration claims. 2

[2] See, *United States v. LeMoure*, 474 F.3d 37 (1st Cir. 2007)citing all other circuits that have spoken on this issue are all opposed to the Second Circuit's restrictive view. 3

of Section 1512 and also outside of the reach of Section 1503, creating an unintended statutory gap and increased conflict between circuits.

A. The Statutory Structure of Witness Tampering Amendments

In 1982, Congress amended 18 U.S.C. 1503 to eliminate any explicit reference to "witnesses" and enacted in its place the witness tampering statute, 18 U.S.C. Sec. 1512. Victim and Witness Protection Act, Pub. L. no. 97-291 (1982). That amendment although altered to redact explicit references to witness, its omnibus "due administration of justice" clause remained. Pertinently, section 1503 makes it unlawful to:

> corruptly...endeavor[ ] to influence.... any grand or petit juror, of officer in or of any court of the United States...or corruptly...influence[ ], obstruct[ ], or impede[ ], or endeavor [ ], to influence, obstruct, or impede, the due administration of justice.

Section 1512(b)(1) focuses on witnesses as well as victims and informants), and makes it unlawful to:

> knowingly use[ ]intimidation, threaten[ ], or corruptly persuade[ ] another person, or attempt [ ] to do so, or engage[ ] in misleading conduct toward another person, with intent to—(1)influence, delay, or prevent the testimony of any person in an official proceeding.

The Second Circuit takes guidance by the canon, instructive rather than mandatory, that a specific treatment prevails over a more general

provision, *United States v. Lara*, 181 F.3d 183, 198 (1st Cir.), cert. denied, 528 U.S. 979 (1999); that canon has added force where, as here, the term "witness" was deleted from the broader statute at the same time the new, more specific statute was adopted.

B. Congressional Intent in the Witness Tampering Amendments

However, Section 1503 was enacted with two objectives: to protect witnesses, jurors, and court officers, and to "prevent a miscarriage of justice by corrupt methods." *United States v. Lester*, 749 F.2d 1288, 1292 (9th Cir. 1984). The term "witness' was deleted in 1982 from the first clause of section 1503; but Congress left intact the omnibus clause forbidding efforts to obstruct the due administration of justice, which had previously been read by courts to encompass the corrupt persuasion of witnesses. *United States v. LeMoure*, 474 F.3d 37 (1st Cir. 2007).

Moreover, when section 1512 was initially enacted in 1982, it dealt only with the use or threat of force against a witness; the ban on corrupt persuasion was added only later in 1988. Anti-Drug Abuse Act of 1988, Pub. L. 100-690, Sec. 7029(c) (1988). The *LeMoure* court found it improbable that, in 1982, Congress meant to adopt (in section 1512) a specific ban against forcible intimidation while impliedly narrowing (in section 1503) the omnibus clause so as to decriminalize corrupt but non-forcible interference with witnesses.

Thus, over and above the general presumption against repeals merely by implication, *United States v. United Cont'l Tuna Corp.*, 425 u.S. 164, 168 (1976), this implied repeal would mean that Congress had meant in 1982 to reduce the protection afforded against soft witness tampering

at the very time that it was trying to expand protection of witnesses. Yet the statute's purpose was " to enhance and protect the necessary role of ... witnesses in criminal justice process..." Victim and Witness Protection Act of 1982, Pub. L. 97-291, Sec. 2(b)(10-(2).

The post-1982 legislative history further supplements this rationale, Senator Biden's statement in 1988 when Congress amended section 1512 to cover non-coercive witness tampering is on point. In reporting the bill out of committee, Senator Biden explained the amendment was intended...merely to include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503, it would permit prosecution of such conduct in the Second Circuit, where it is not now permitted, and would allow such prosecutions in other circuits to be brought under section 1512 rather than under the catch –all provision of section 1503.
134 Cong. Rec. S17, 369 (1988) (statement of Sen. Biden).

C. Due Process and the Second Circuit's Restrictive View of Witness Tampering Statutory Interpretation

In *Barco-Sandoval v. Gonzales*, 516 F.3d 35 (2d Cir. 2008) the Second Circuit revisited several earlier decisions regarding the discretionary relief of cancellation of removal to determine how constitutional claims or questions of law therein become reviewable, to conclude that *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 n.10 (2006) as governing on the issue.

That court posed the question that if *DeLa Vega v. Gonzales*,, 436 F.3d 141 (2d.Cir.

2006)remained binding, that it lacked jurisdiction to review a challenge to the BIA's decision denying a petitioner the discretionary relief of cancellation of removal. That court concluded in *De La Vega* that "the BIA's discretionary determinations concerning whether to grant cancellation of removal constitute 'judgment[s] regarding the granting of relief under...section 1229b' within the meaning of 8 U.S.C. Sec. 1252(a)(2)(B)(i) and therefore the review of such determinations falls outside our jurisdiction." 430 F.3d at 144. That court further held that "(1) 'exceptional and extremely unusual hardship' determinations by the BIA are discretionary judgments and (2) tht they therefore lack jurisdiction to review such judgments." *Id.* At 145-46.

In that same court decision, the court found that it must re-examine *De La Vega*, however, because in concluding that they lacked jurisdiction review the agency's discretionary denial of cancellation of removal, they "relied partly on reasoning in *Xaio Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144 (2d Cir. 2006) which was "significantly revised" after *De La Vega* was decided. *Xiao Ji Chen* held that 'challenges to the exercise of routine discretion by the Attorney General (or the BIA as his designee) do not raise 'constitutional claims or questions of law,' and may not therefore be reviewed by this Court, notwithstanding Section 106 of the REAL ID Act." Citing *Xiao* at 434 F.3d at 154. Applying this principle,

they concluded in *De La Vega* that "Section 106 of the REAL ID Act does

not override statutory provisions denying the courts jurisdiction to review discretionary decisions of the Attorney General," including the "BIA's discretionary judgment that [a] petitioner failed to show 'exceptional or extremely unusual hardship' justifying cancellation of removal." 436 F.3d at 146.

On rehearing *Xia Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315 (2d Cir. 2006) the court 'revise[d] substantially our analysis in Part I of the earlier *Xiao* case as to what constitutes 'questions of law' under section 106(a)(1)(A)(iii) in the REAL ID Act." 471 F.3d at 319. Instead of interpreting "questions of law' to mean only "matters of statutory construction," in *Xie Ji Chen*, on rehearing, the court interpreted 'question of law' more broadly to "encompass the same types of issues that courts traditionally [reviewed] in habeas review over Executive detentions," *Xiao*, 471 F.3d at 326-27.

In the *Xiao* rehearing, that court reaffirmed that 'although the REAL ID Act restores our jurisdiction to review constitutional claims or questions of law, 8 U.S.C. Sec. 1252(a)(2)(D), they remain deprived of jurisdiction to review decisions under the INA when the petition for review essentially disputes the correctness of the IJ's fact-finding or the wisdom of his exercise of discretion and raised neither a constitutional claim nor a question of law. 471 F.3d at 329. That court on rehearing further held that even though a "constitutional claim" or question of law" may 'arise for example in the fact-finding which is flawed by an error of law" or "where a discretionary decision is argued to be an abuse of discretion because it was made without

rational justification or based on a legally erroneous standard," *id.*, a petitioner cannot 'us[e] the rhetoric of a 'constitutional claim ' or 'question of law' to disguise what is essentially a quarrel about fact-finding or the exercise of discretion," *id.* At 330. By this reasoning, the IJ below could refuse to allow any fact-finding into the record and such denied due process would be an unreviewable constitutional claim upon appeal. The *Barco-Sandoval* decision concludes its analysis by advancing the litmus test of a viable constitutional claim or federal question by citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 n. 10 (2006) as outlined supra, whereby Petitioner's intent as evidenced by what is allowed into the record, is determinative.

D. The Court of Appeal's Decision

The Court of Appeal's denied the Petitioner's motion to proceed in forma pauperis and for a stay of removal in connection with his petition for review of an order of the Board of Immigration Appeals ("BIA"). That court noted that it generally lacks jurisdiction to review the agency denial or an application for cancellation of removal, citing 8 U.S.C. 1252(a)(2)(B)(I) and *Barco-Sandoval v. Gonzales*, 516 F.3d 35, 38-40 92d Cir. 2008) and further noting that Petitioner raised no constitutional claims or questions of law over which they would retain jurisdiction citing 8 U.S.C. Sec. 1252(a)(2)(D) and *Barco-Sandoval*, 516 F.3d at 40-42. Neither the Petitioner's witness tampering claim itself nor the IJ's refusal to consider the claim was not specifically addressed in the court's opinion.

REASONS FOR GRANTING THE PETITION

The decision below creates one circuit conflict and extends another as to thevitally important and frequently recurring issues of federal law: (1) whether the 18 U.S.C. Sec. 1503 does embrace witness tampering under its omnibus "due administration of justice" clause and (2) whether due process is afforded Petitioners seeking "exceptional and extremely unusual hardship" determinations when the validity of those decisions remain unchallenged because the Second Circuit claims to lack jurisdiction to review a "quarrel about...the exercise of discretion" unless the record below will support a constitutional claim or question of the law that meets the federal question jurisdiction advanced in *Arbaugh v. & H Corp.*

I. The Circuits Are Divided over Whether the Section 1503 Omnibus "Due Administration of Justice Clause Covers Witness Tampering

The Second Circuit remains the only jurisdiction, of those that have considered the issue, to hold that the omnibus "due administration of justice" clause is not applicable to witnesses. Therefore, it has created a statutory coverage gap wherein those who do less than engage in intimidation, threatening and misleading conduct are not bound to the more the catch-all, and more comprehensive, Section 1503 omnibus clause.

A. This Case Squarely Presents the Conflict

The fact pattern below is unique, in that the alleged actions taken by the DHS attorney were not intimidating, threatening or misleading
while the impact they had did impair the due administration of justice sufficiently to thwart

due process in the immigration court. The Petitioner sought from this witness's testimony that because he did not have a "green card" as indicia of an ability to support his children, he lost custody of them, and while paying to the state of Massachusetts child support from another state, the Massachusetts's Department of Social Services terminated his parental rights for abandonment after serving him by general notice in a Massachusetts's newspaper. After contact with the DHS attorney the petitioner's identified expert witness would not provide any assistance to the Petitioner. That the IJ below was indifferent to any claims of witness tampering raises due process issues that must be re-examined in the light of petitions on appellate review for constitutional claims and federal questions. Should "fact-finding" distinctions embrace all actions taken by the IJ below, no claim could muster the evidentiary requirements of *Arbaugh v. Y & H Corp..*, should the IJ refuse to consider the issue, to achieve constitution law of federal question status.

B. The Issues Presented by the Conflict is Recurring and of Great Practical Importance

With the enactment of the 1996 acts and the REAL ID Act, many commentators predicted that far fewer immigration cases would wind up in the courts. In fact, quite the opposite result has occurred. In the past four years, "The U.S. Court of Appeals have seen a dramatic increase in immigration cases. More people than ever are petitioning the Courts to

review decisions of the BIA (Palmer, Yale-Loehr, and Cronin, 2005)[3] Less ambiguity between the Circuits would expedite caseload management and eliminate unnecessary waste of judicial time and resources. Criminal acts thwarting the due process of immigration proceedings, as sui generis reviewable claims, would buttress those administrative proceedings as more adequate substitutes for a federal judicial proceeding than currently provided

II. The Decision Below Reflects Widespread Uncertainty Over Applicable Standard As In *Arbaugh v. Y & H Corp.*, In Immigration Removal Proceedings, Which this Court Alone Can Dispel

The Second Circuits standard as espoused in *Arbaugh*, supra, and that advanced by the Nineth Circuit in *Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005) need review for conformity of application to reduce inter-circuit conflict. In *Martinez-Rosas*, "to be colorable in this context, the alleged [constitutional] violation need not be substantial, but the claim must have some possible validity," *Martinez-Rosas*, 424 F.3d at 930.

In providing unified standards for constitutional claim and federal question reviews, this Court could insure that the appellate evidentiary requirements do not surpass the petitioner's capability to develop a sufficient record for review below. The *Arbaugh* decision and the context in

[3] This discussion is taken from Dobkin, D.S. work, for greater detail see his 2007 note, "the Diminishing Prospect for Legal Immigration: Clinton Through Bush," 19 St. Thomas Review.

which that espoused standard was established is best know to this Court and his Court alone can discern whether the context in an immigration court proceeding is comparable.

III. The Decision Below is Incorrect

A. The Court Below Erred In Concluding that it Did Not Retain Jurisdiction Over Constitutional and Federal Questions of Law

There is no sound reason to uphold the Second Circuit interpretation of the witness tampering clauses. Section 1503 omnibus "due administration of justice" clause covers witness tampering more broadly than any other provision in the witness tampering and justice obstruction clauses and covers the improper contact that was submitted for IJ review below. That the IJ refused to consider the impact of criminal activity on the Petitioner's right to due process below, does not remove its viability for consideration as a reviewable constitutional claim at the appellate level. Evidence of criminal actions impacting the provision of due process at the administrative level are sui genris reviewable upon appeal.

CONCLUSION

The petition for a writ of certiori should be granted.

Respectfully submitted.
Arthur A. Smith

Counsel of Record for Petitioner
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Solicitor General of U.S.
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Washington, DC 20530-0001

January 2009

APPENDICES

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APPENDIX A

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

November 13, 2008

Mr. Arthur Allan Smith
28 Grand Street
Hartford, CT 06106

Re: Manny Tempitope Oyenuga
v. Michael B. Murkasey, Attorney General, et al.
Application No. 08A425

Dear Mr. Smith:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsbburg, who on November 13, 2008 extended the time to and including January 15, 2009. This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter,
C lerk
By_____s/s Ruth Jones Case Analyst

Appendix A

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Arthur A. Smith
28 Grand Street
Hartford, CT. 06106

Mr. Gregory G. Garre
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Clerk
United States Court of Appeals for the Second Circuit
1702 US Courthouse, Foley square
New York, NY 10007

Appendix B

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Court House
40 Foley Square, New York, N.Y. 10007

Catherine O"Hagan Wolfe
Clerk of the Court

At a stated Term of the united States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 18th day of August two thousand eight.
Before: Hon. Joseph M. McLaughlin,
Hon. Debra Ann Livingston,
Circuit Judges, date stamp 8/18/2008
Hon. Nina Gershon*,
District Judge.

Manny Temitope Oyenuga,
Petitioner,

v. Order
Micahel B. Muskasey, U.S. Department of Justice, No. 08-0690-ag
Micheal Chertoff, Secretary of Department of Homeland Security,
Respondents.

Manny Temitope Oyenuga having filed a motion for reconsideration and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the motion be denied.
*Honorable Nina Gershon, of the United States District Court for the Eastern District of New York sitting by designation.

For the Court
Catherine O'Hagan Wolfe, Clerk

By..... .....s/s Frank Perez, Deputy Clerk

APPENDIX C

MANDATE

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated term of the United States Court of Appeals for the second
Circuit, held at the Daniel Patrick Moynihan United states Courthouse, 500 Pearl Street, in the City of New York, on this 3rd day of June two thousand and eight.

Present:
Hon. Joseph m. McLaughlin,
Hon. Debra Ann Livingston,
Cirucit Judges,
Hon. Nina Gershon*,
District Judge

date stamped Jun 03 2008

Manny Temitope Oyenuga,
Petitioner
v. Michael B. Musasey, et al. 08-0609-ag
Respondents

Petitioner moves for leave to proceed in forma pauperis and for a stay of removal in connection with his petition for review of an order of the Board of Immigration Appeals 9"BIA"). Upon due consideration , it is hereby ORDERED that the motions are DENIED and the petition for review is DISMISSED because it lacks an arguable basis in law or fact. See Neitzke v. Williams, 400U.S.319, 325 (1989): 28 U.S.C. Sec. 1915(e)(2). In particular, we note that we generally lack jurisdiction ot review the agency's denial of an application for cancellation of removal. See 8 U.S.C.Sec. 1252(a)(2)(B)(I); Barco-Sandoval v. Gonzales, 516 F.3d 35,

38-40 (2d cir.2008). furthermore Petitioner raises no constitutional claims or questions of flaw over which

we would retain jurisdiction. See 8 U.S.C. Sec. 1252(a)(2)(D); Barco-Sandoval, 516 F.3d at 40-42. Petitioner's remaining arguments not directly pertaining to the agency's denial of cancellation of removal are without merit. See Pillary v. INS, 45 F.3d 14, 17 92d Cir. 1995)

A TRUE COPY	For the Court
Catherine O'Hagan Wolfe	Catherine O'Hagan Wolfe,
Clerk	Clerk
by_____s/s	by.....s/s
Yana Segal	Frank Perez

*Honorable Nina Gershon, of the United States District Court for the eastern District of NewYork, sitting by designation.

Certified on

APPENDIX D

U.S. Department of Justice
of Immigration Appeals
Falls Church, Virgina 22041

Decision of the Board

File: A99-395-433-Hartford, CT
Date: Jan. 23 2008

In re: Manny Temitope Oyenuga

In Removal Proceedings

Appeal

On Behalf of Respondent: Arthur A. Smith, Esq.

On behalf of DHS: Leigh Mapplebeck
Assistant Chief Counsel

Charge :

Notice: sec 2129a)(6)(A)(i), I&N Act[8 U.S.C. Sec. 1182(a)(6)(A)(i)]=

Present without being admitted or paroled

Application: cancellation of removal under section 240A

Order:

Per Curiam. The respondent, a native and citizen of Nigeria, appeals the Imigration Judge's decision dated September 28, 2007, which found him removable as charged and denied his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. Sec. 1229b(b). The request for oral argument is denied. See 8 C.F.R. Sec. 1003.1(c)(7) (2007). The appeal will be dismissed.

Initially., we find no merit to the respondent's arguments that he was denied access to records of his entry and that the Immigration Judge erred in finding him removable as charged during a maser calendar hearing and before all evidence had been submitted. See Respondent's brief at 8.

It is the alien's burden to show, by clear and convincing evidence, that he is lawfully present in the United States

pursuant to a prior admission, though he shall have access

to his visa or other evidence of entry in meeting this burden of proof. See section 240 (c)(2) of the Act, 8 U.S.C. Sec. 1229a(c)(2). However, the record shows that the respondent was unable to produce evidence reflecting his alleged entry with a student visa, and counsel for the Department of Homeland Security(DHS)noted on the record that the DHS had been unable to locate any evidence of such entry(Tr. At 4, 7-8, 13-16, 153-154). In addition, when confronted with evidence showing that nor prior entry was found, the respondent had no response (Tr. At 22-23) In fact, to date, the respondent has not provided any evidence of a lawful entry inot the United States.

We agree with the immigration Judge that the respondent failed to establish that his removal to Nigeria would result in exceptional and extremely unusual hardship for his qualifying relatives,[1]three United States citizen children(I.J. at 6-8).[2]See section 240A(b)(1)(D) of the Act. The respondent indicated that he did not have custody of the children and had not supported them or had contact with them for years (Tr.at 94-95, 116-122, 129-130). See generally matter of Andazola, 23 I&N Dec. 319 (BIA2002); Matter of Monreal, 23 I&N Dec. 56 (BIA 2001). We find no error in the Immigration Judge's determination that the

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[1] Although the Immigration Judge's factual determinations in connection with a cancellation of removal application are reviewed for clear error, 8 C.F.R. Sec. 1003.1(d0(30(i), whether those facts support a finding of "exceptional and extremely unusual hardship" is a question of law that we review de novo, see 8 C.F.R. 1003.1(d)(3)(ii).

[2] As the Immigration judge noted, the respondent did not submit birth certificates for any of these children

affidavit from the psychiatrist (Exh. 3, Tab. I), who had never met the children, had no probative weight (I.J. at 7). See Respondent's Brief at 9. Such a determination is specifically within the Immigration judge's purview when adjudicating an application for relief from removal. See section 2409c)(4)(B) of the Act.

The respondent argues that the Immigration Judge should have subpoenaed an attorney from the Department of Social Services (DSS) and allowed testimony from the respondent's brother. See Respondent's Brief at 9. We agree with the Immigration Judge that the respondent has not shown how testimony from the DSS attorney as to the circumstances under which the respondent's parental rights were terminated is relevant to the question of whether his children would suffer the requisite level of hardship if the respondent is removed to Nigeria at this time(I.J. at 8). See generally 8 C.F.R. Sec. 1003.35(b)(3) (an immigration Judge will issue a subpoena when satisfied that the witness's evidence is essential). We similarly agree that, given the duration of time elapsed since the respondent had contact with the children, testimony form the respondent's brother as to the close relationship The respondent previously had with his children is not particularly probative as to any current level of hardship (Tr. At 158-159).

In addition, the respondent contends that his statutory right to confidentiality was violated when DHS introduced into evidence a Form I-213, Record of Deportable/Inadmissible Alien, without redacting protected information from his Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act. See Respondent's Brief at 8. In pertinent part, the law precludes making any publication whereby the information furnished by any particular applicant

can be Identified. See section 245A(c))(5)(A)(ii) of the Act, 8 U.S.C. Sec. 1255a(c)(5)(A)(ii). Although he argues that

protected information was disclosed, the respondent does not identify what information on the Form I-213 is in fact the type of information on the Form I-213 is in fact the type of information from the Form i-687 that is protected by statute. We also note that the respondent did not object to the admission of the document, which initially was partially read into the record by the Immigration judge (Tr.at 22). Moreover, the respondent subsequently submitted the similarly unredacted document to the Court, including s part of his application for relief. (exh.3, tab. K).

Finally, to the extent the respondent offers arguments s to the propriety of his bond and detention, we emphasize that there is no decision on such matters which we have jurisdiction. See 8 C.F.R. Sec. 1003.1(b). Accordingly, the appeal is dismissed.

By_____s/s
Roger S. Paul for the Board

that stated that he was their father (I.J. at 2-3, Tr. At 128-129). He was apparently adjudicated the father of two of the children (Exh. 3 tas A, H).

Appendix E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
HARTFORD, CONNECTICUT

File No. : A99 395 433 September 23, 2007

In the Matter of	)	
Manny Tempitope Oyenuga,	)	In Removal Proceedings
Respondent	)	

Charge: Section 212 9a) (6) (A)(i) of the Immigration and Nationality Act- present without having been admitted or paroled.

APPLICATIONS : Cancellation of removal for non-permanent residents.

On behalf of Respondent:	On behalf of DHS:
Arthur A. Smith	Leigh Mapplebeck
55 Oak Street	Senior Litigation Counsel
Hartford, CT	

Oral Decision of the Immigration Judge

Introduction

The respondent appeared before immigration Judge Owens. He admitted the allegations that he is a citizen of Nigeria but denied that he was present without having been admitted or paroled. The Court would not (sic)that it is the

respondent's burden to show time, place and manner of entry. The Court finds that he has not established that he entered with a visa as he claims. Accordingly, the Court

finds that removability has been established by clear and convincing evidence. The Court finds that even if he did enter as an F-1 visa, it is clear that he is out of status and has been out of status for a long time.

The respondent applied for relief in the form cancellation of removal for a non-permanent resident.

STATEMENT OF THE FACTS

The respondent was born in Nigeria on April 26, 1959. He is the second youngest of five brothers. He states that after his father died, his oldest brother was responsible for them.

He states that he came to the United States in 1980 with a student visa when he was 21. According to him, at that time, all of his brothers were in the United States. He maintains that his oldest brother, frank, helped him obtain his visa. The respondent did provide documents indicating that he atrtended Bristol Community College in Fall River, Massachusetts starting in the fall of 1980. He apparently stopped going to classes in 1981 because he was working. He sates that he never got a degree there and that his oldest brother was disappointed because he did not obtain a degree.

The respondent states that he met his U.S. citizen wife in Fall River and that they married in 1985. He maintains that his wife never filed an I-130 on his behalf. He states that his wife died in February of 1989 of cancer and that she had a son but they had no children together.

He then states that in 1991, he met a U.S. citizen named Ms. Hamblin through a friend named Heather Schenck. He maintains that he lived with Ms. Hamblin from 1993-1999

in public housing in fall River. He states that he had three children born with Ms. Hamblin. The respondent, however, did not provide any birth certificates for these children

listing him as the father. He states that his first child named Nathan was born on April 23, 1993 in fall river. Another daughter named Jasmine was born sometime in August of 1955 in Fall River and another child named Dante Hamblin was born in 1997. He claims that he lived with the children and helped to support them. He states that their mother, Ms. Hamblin, was on welfare and had mental problems. He states that she was somehow investigated by the Department of Social Services due to these issues and that the children were removed from the home in 1999. The record includes a suggested order for paternity addressed to the respondent. It was issued by the Probate Court in Massachusetts and states that he respondent was required to pay child
Support for two of the children as of August 9, 1995. Respondent also provided some documents indicating that in 2003 into early 2004 he was providing child support.

The respondent provided also a printout from the Social security Administration indicating that the first record earnings were in 1984 to 2004.

Then he states that he went to the department of Social Services in Massachusetts about the custody of the children and claims, without corroboration, that he was told that he did not have status in this country and a job. He then states that in 1999 he moved to Charlotte, North Carolina to obtain his Immigration status but was unable. He states that he last saw his children in 1999. He claimed that he had telephone contact with his children for the last time in 2002. Respondent was asked whether he ever went up and visited the children and he stated no because he was trying to get his permanent residency.

He states that he moved to Maryland with his brother, frank. His brother, Frank, submitted an affidavit indicating that he lived with him from 2004 through 2007. The

respondent apparently applied for amnesty and legalization and was rejected. He states he was still providing for the child and child support was taken out. He states that his brother, frank, in Maryland owned a construction company and that he was learning skills from his brother. He maintained, however, that he did not work in either 2005 or 2006 because his brother could not hire him.

The respondent states that right after leaving North Carolina, he went back to fall River for the first time and was told to go to the Probate Court. He was told that his children were in a foster home. He claims at the time that he was unaware of that and he did not receive notice from the department of Social Services regarding termination of parental rights. The respondent, however, did not provide anything in writing about this.

He then states in February of 2007, he moved back to Fall River to try to get custody of the children and claims that he consulted with an attorney in New Bedford, Massachusetts. He states that his brother, Frank, told him he would no longer help him obtain immigration status but bought him a car and apartment in Fall River. He states that his brother tried to obtain evidence of his F-1 entry through the embassy but was not sure what the results were.

Respondent then apparently moved up to Vermont later in 2007. He states that he is not indigent. He states that he is willing to speak to the department of Social Services. He also maintains that he cannot locate the children's mother and has no idea where the children are now.

The respondent provided a letter or affidavit from Pamela Kirk Botnick. She states that she is a psychiatrist and licensed to practice medicine in the State of Connecticut and specializes in child and adolescent

psychiatry. She apparently reviewed the respondent's file. She states that the records reflect that the respondent tried to maintain contact with his children. In her professional opinion, the removal of the respondent from his children will interfere significantly with their social/emotional development and would likely result in unconscionable harm to his children now and to their future psychological well being.

The Court held a hearing on the respondent's cancellation of removal application on August 29th. The respondent complained that he needed time to arrange for witnesses. Based on the respondent's request, the matter was continued for today.

The respondent requested the Court subpoena a Diane Curran, a Deputy general Counsel, Commonwealth of Massachusetts, department of Social Services, as well as the trial attorney. Respondent also requested continuances.

CANCELLATION OF REMOVAL FOR NON-PERMANENT RESIDENTS

To qualify for cancellation of removal under Section 240A(b) of the Act, the respondent must demonstrate physical presence for at least 10 years, good moral character and that removal would result in exceptional and extremely unusual hardship to a spouse, parent or child who is a U.S. citizen or permanent resident. In making that determination, the Court will be guided by the BIA decision in Matter of Monreal, 23 I &N Dec. 56 (BIA 2001).

ANALYSIS AND FINDINGS

The Court finds that the respondent has demonstrated continuous physical presence in this country basd on the Social Security printout and the transcript from the Bristol

Community College. There appears to be no issues in term of good moral character.

The issue in this case is whether the respondent has demonstrated that his removal would result in exceptional and extremely unusual hardship to his two U.S. citizen children. The record reflects that the respondent had his last contact with the children by telephone in 2002. He has not physically seen them since 1999. Apparently the children have been taken into the Department of Social Services custody and the respondent has absolutely no idea where they are or what they are doing. The respondent maintains that somehow he was unlawfully deprived of his parental rights since he was still providing some child support. There is a letter from a psychologist who indicates that in her opinion after reviewing the respondent's file that respondent 's removal would interfere significantly with the children's development and would result in unconscionable harm to his children.

The Court finds that the respondent's claim has no merit. The Court is baffled as to how a psychologist could issue a letter such as this without seeing the children or know anything about what the children are doing now. The court frankly gives this document no weight whatsoever. The Court finds that this psychologist really has no basis to make this determination without knowing anything about what the children are doing or anything as to why the Department of Social Services took custody over them.

The Court finds that the respondent has not demonstrated that his removal would result in exceptional and extremely unusual hardship to the children. The Court

finds that any finding that removal would result in exceptional and extremely unusual hardship is total speculation and without any basis in this record whatsoever. In addition, the Court cannot review or go

back to determinations made by the Probate Court in Massachusetts or the Department of Social Services. That is clearly beyond the purview of what his Court has to do today.

The respondent is trying to subpoena the Deputy General Counsel of the Department of Social Services for the Commonwealth of Massachusett. The Court finds that this witness has absolutely no relevance to this case whatsoever. As told to respondent's counsel, what the Court is here to do is to decide exceptional and extremely unusual hardship and somebody working in the General Counsel's Office for the Department of Social Services simply has no impact on this case whatsoever. The court cannot go back to determine whether what they did was right or wrong and that the decision has been made and the Court must base it's decision based on the current facts now rather than what the respondent thinks they should have been. Why the Department of Commonwealth terminated the respondent's parental rights is unknown to this Court but frankly, those reasons really would not make a difference in terms of the Court's decision as it appears that the children have been taken into custody by the department of Social Services and may Now even be adopted.

In conclusion, the Court finds that the respondent has not established anything close to exceptional and extremely unusual hardship. Therefore, the court finds that the respondent has not met his burden of proof.

The respondent has not applied for any other relief from removal and accordingly he must be ordered removed to Nigeria.

Order

IT IS HEREBY ORDERED that the respondent's application for cancellation of removal for non-permanent residents is denied.

IT IS FURTHER ORDERED that the respondent be removed to Nigera.

Michael W. Straus
Immigration Judge